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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 722

MANUEL GOMEZ BARRIOS,
JOSE GARCIA RODRIGUEZ,
JOSE MANUEL VENTURA VENTURA,
EVALDO ESCANDEL SOTO

Appellants,

v.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF FLORIDA

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO AFFIRM

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STATEMENT OF APELLEE OPPOSING JURISDICTION AND MOTION TO AFFIRM

The appellants, pursuant to applicable provisions of controlling law, have heretofore filed their jurisdictional statement supplementing their appeal from an order of the Supreme Court of the State of Florida. The appellee, believing that the matters set forth herein will demonstrate the lack of substance in the questions sought to be presented by such appeal, file this Statement in Opposition to Appellants Jurisdictional Statement and includes its

Motion to Affirm the Judgment of the Court below, upon the ground that the question on which the decision of this cause depends is so unsubstantial as to obviate further argument.

STATEMENT

The appellee adopts the appellants' statement of the case with the exception of the conclusions of fact or law that might be contained therein.

ARGUMENT

1. The questions presented in this appeal are plainly unsubstantial and the case should therefore be dismissed. In this connection, it is appropriate to point out that on May 20, 1964, shortly after the arrests and convictions herein, Congress enacted 16 U.S.C.A. Section 1081 (see Appendix A).

Said legislation is considerably broader in scope and effect in Section 370.21, Florida Statutes (See Appendix B). In all likelihood the Federal act has preempted Section 370.21, Florida Statutes. The possibility of another prosecution under Section 370.21, Florida Statutes is extremely remote. The decision below affects no one other than the litigants.

The application of Section 370.21, Florida Statutes to the appellants may be characterized as episodic. The

resolution of the questions presented in the instant matter will have no immediate importance beyond the particular facts and parties involved. The questions presented in this case have no importance to the public as distinguished from importance to the particular parties involved. The appeal should, therefore, be dismissed. *Layne & Bowles Corp. v. Western Well Works,* 261 U. S. 387, 393. *Rice v. Sioux City Cemetery,* 349 U. S. 70, 79.

As far as the individuals are concerned the questions are moot. Appellants were each sentenced to six months in the county jail. Said sentence was suspended on the condition that a fine of $500.00 each be paid (R 138). The fines were paid. (See page ix of appellants' brief filed in the Supreme Court of Florida. Said brief has been lodged with the record as Appellee's Exhibit No. 1.) Voluntary payment of the fine imposed terminates the action and precludes a review of the conviction. *Bergdoll v. U. S.,* 279 F. 404; See also 18 ALR 867; 74 ALR 638; 4 Am. Jur. 2d, *Appeal and Error,* Section 272, P. 766.

Even a reversal of the decision of the Florida Supreme Court would not inure to the benefit of the appellants. Having paid their fines, appellants may not recover their money. *City of Miami v. Keton,* (Fla. 1959) 115 So. 2d 547 and authorities cited therein. It is therefore submitted that no substantial issues are presented by this appeal.

2. Appellants have no standing. As will be presently shown, Section 370.21, Florida Statutes, is constitutional. When a statute, valid on its face, requires the issuance of a license as a condition precedent to carrying on a certain

activity, one who is within the terms of the statute, but who has failed to make the required application, is not at liberty to complain of his anticipation of improper or invalid action in administration. *Smith v. Cahoon*, 283 U. S. 553. Appellants not having made application for a license, may not now challenge the validity of the licensing statute.

3. Appellants assert that Section 370.21, Florida Statutes, is an unconstitutional interference with the exclusive federal power over foreign relations, foreign commerce and war. In support of this assertion, appellants point to the fact that at the time of the arrests there were many federal statutes relating to the protection of wildlife resources. Appellants have not shown, however, a single federal statute in conflict with Section 370.21, Florida Statutes.

(a) A state also has the power to conserve the natural resources within its boundaries. *Skipper-Bivens Oil Co. v. State*, 115 S.W. 2d 1016. In the absence of regulation by the United States, a state can regulate within its territory the liberty of fishing in its waters. *Manchester v. Massachusetts*, 139 U.S. 240. At the time of the arrests herein, Congress had passed no legislation in conflict with nor repugnant to Section 370.21, Florida Statutes. The decisions of this court enjoin seeking out conflicts between state and federal regulations where none clearly exists. *Huron, Portland Cement Co. v. Detroit*, 362 U.S. 440.

(b) Appellants' contentions with respect to the relations of the Federal Government with Cuba may be summarily

dismissed by referring the court to 50 Dept. State Bull. 276-279.

Secretary of State Dean Rusk, during a news conference on February 7, 1964, said:

> "Federal authorities, from their investigation and interrogation, concluded that the Cuban vessels were fishing in the territorial waters of the United States contrary to section 251 of title 46 of the United States Code. However, as this statute contains no penalties, prosecution by Federal authorities was not undertaken. As the boats and crews were also in probable violation of the laws of the State of Florida and thus subject to prosecution by State authorities, the Coast Guard allowed the State of Florida to assume jurisdiction. *This step was undertaken in consultation with the Department of State.*" (Emphasis supplied) (50 Dept. State Bull. 277)

In a letter to the President of the United Nations Security Council, the late Adlai Stevenson said:

> "Federal authorities completed their investigation and interrogation of the crews on February 5, 1964. The authorities concluded that the Cuban vessels were fishing in the territorial waters of the United States contrary to Section 251 of Title 46 of the United States Code. However, as this statute contains no sanctions, prosecution by Federal authorities was not undertaken. *At the same time, the Cuban fishing boats*

> *were also in probable violation of laws of the state of Florida and thus subject to prosecution by state authorities.* State officials formally requested the United States Coast Guard to turn the boats and crews over to the jurisdiction of the state. *In accordance with United States law, this was done on February 5, 1964.* Legal proceedings before the state courts are pending." (Emphasis supplied) (50 Dept. State Bull. 279)

Therefore, it appears that, far from appellants' contention, the actions of the State of Florida under Section 370.21, Florida Statutes, were taken with the approval of the Department of State, the Federal agency charged with carrying out the foreign policy of the United States.

In addition, appellants were apprehended by the United States Coast Guard. They were escorted by the Coast Guard to Key West, after consultation with the Department of State. 50 Dept. State Bull. 276. The original arrest was not made at the request of the State of Florida. The idea to arrest the appellants originated in the Federal Government. Appellants' assertions in this matter are patently spurious.

4. Appellants contend that Section 370.21, Florida Statutes, denies the equal protection of the laws to a particular class of aliens. An examination of the statute is sufficient to refute this contention.

Subsection (3) of Section 370.21, Florida Statutes, prohibits the issuance of a license to any individual who subscribes to the doctrine of international communism. The

statute thus denies a license to a citizen of the United States, the State of Florida or of a foreign state whatever its form of government, if such person subscribes to the doctrine of international communism. The most militant anti-communist, of whatever nationality, is subject to fine and imprisonment if aboard an unlicensed alien vessel that fishes in Florida waters. Contrary to appellants' contentions, therefore, Section 370.21, Florida Statutes, does not affect a particular class of aliens.

The state has the power to discriminate against "persons who subscribe to the doctrines of international communism". The denial of licenses to such persons has a rational basis and is not arbitrary. *Bryant v. Zimmerman*, 278 U. S. 63; *Hernandez v. Texas*, 347 U. S. 475; *Griffin v. Illinois*, 351 U. S. 12.

In *Uphaus v. Wyman*, 360 U. S. 72, the court recognized the state's right to protect itself. An attack or act of sabotage carried out against the United States endangers the lives and property of the citizens of the State. World tensions as they are, Section 370.21, Florida Statutes, does not make an unreasonable classification. It has the effect of keeping those persons most likely to launch such an attack away from our shores. The national defense is not an exclusively federal function so as to preclude the cooperation of the States. *State ex rel. Gibbs v. Gordon*, (Fla. 1939), 189 So. 437.

The court has often recognized the propriety of loyalty oaths and questionnaires to determine the fitness of persons

to occupy certain positions. *Konigsberg v. State Bar of California*, 336 U. S. 36; *In re Anastaplo*, 366 U. S. 82; *Adler v. Bd. of Education*, 342 U. S. 485; *Garner v. Bd. of Public Works of Los Angeles*, 341 U. S. 716; *Gerende v. Bd. of Elections of Baltimore*, 341 U. S. 56; *American Communications Ass'n v. Douds*, 339 U. S. 382. It follows then that the state may exclude from its territorial waters persons who in the light of present day world tensions, are apt to commit acts against the United States and which acts are dangerous to the lives and property of the citizens of the state.

5. Section 370.21, Florida Statutes, clearly and explicitly prohibits the taking and possessing, from the territorial waters of Florida, the resources of the state by an unlicensed alien vessel. The statute is not vague. In short, it prohibits alien vessels from fishing without a license.

Appellants, however, contend that the phrase "subscribes to the doctrine of international communism", Section 370.21 (3), Florida Statutes, is unconstitutionally vague. In the cases cited by appellants in support of this argument, the person who was required to interpret similar words was also subject to a penalty (perjury, dismissal, etc.). The fact that the words were vague placed the person in danger of the penalty if his interpretation of the words did not coincide with that of some other authority. Not so with the instant statute. It clearly and explicitly prohibits unlicensed fishing. The appellants were not required to make a decision based upon their interpretation of the words "subscribes to the doctrines of international

communism". They were required to obtain a license before they fished. The Florida Board of Conservation might be required to determine the meaning of the words, but appellants were not. They are therefore in no position to challenge the validity of the statute on grounds of vagueness.

6. Appellants contend that Section 370.21, Florida Statutes, grants the Board unlimited administrative discretion to determine who "subscribes to the doctrine of international communism." This point was not raised in the court below (Appellee's Exhibit No. 1), and cannot be considered. *McGowan v. Maryland,* 366 U. S. 420; *Sherman v. U. S.,* 356 U. S. 369; *DeSylva v. Ballentine,* 351 U. S. 570. Be that as it may, however, the determination of the Florida Board of Conservation is subject to review. Chapter 120, Florida Statutes, provides for such review. Provision for notice and charges are inappropriate in a licensing statute. It is the appellants' duty to initiate the proceedings.

CONCLUSION

It is respectfully submitted by the appellee that the questions submitted for decision by this court by the appellants are not substantial and urge the granting of appellee's motion to affirm.

Respectively submitted,

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APPENDICES

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APPENDIX A

Title 16, U.S.C.A. §1081

PROHIBITION AGAINST FISHING IN TERRITORIAL WATERS; EXCEPTIONS

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or to engage in the taking of any Continental Shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States is a party. However, sixty days after written notice to the President of the Senate and the Speaker of the House of Representatives of intent to do so, the Secretary of the Treasury may authorize a vessel other than a vessel of the United States to engage in fishing for designated species within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or for resources of the Continental Shelf which appertain to the United States upon certification by the Secretaries of State and of the Interior that such permission would be in the national interest and upon concurrence of any State, Commonwealth, territory, or possession directly affected. The authorization in this section may be granted only after a

finding by the Secretary of the Interior that the country of registry, documentation, or licensing extends substantially the same fishing privileges for a fishery to vessels of the United States. Notwithstanding any other provision of law, the Secretary of State, with the concurrence of the Secretaries of the Treasury and of the Interior, may permit a vessel, other than a vessel of the United States, owned or operated by an international organization of which the United States is a member, to engage in fishery research within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters, resources of the Continental Shelf which appertain to the United States and to land its catch in a port of the United States in accordance with such conditions as the Secretary may prescribe whenever they determine such action is in the national interest. Pub.L. 88–308, § 1, May 20, 1964, 78 Stat. 194.

APPENDIX B

The Florida Territorial Waters Act of 1963 (Section 370.21, Florida Statutes)

TERRITORIAL WATERS ACT

Chapter 63-202

An Act relating to territorial waters of the state of Florida; prohibiting the licensing of certain alien-owned commercial fishing vessels; making certain operations unlawful when conducted by such vessels in Florida

waters; providing for enforcement by harbor masters, sheriffs, agents of the department of conservation and others; providing penalties and effective date.

Whereas, it is the sense of the Legislature to protect the vital State resources contained within the territorial waters of Florida in order to conserve the same and secure to the citizens of the State the full benefits of their patrimony, and

Whereas, the Legislature intends to deny, within limitations imposed by the Constitution of the United States, to nationals of alien neutral and hostile powers the right to draw upon the resources of waters long considered by the immemorial usages of all civilized peoples a part of our State and Nation.

Now, Therefore,

Be it enacted by the Legislature of the State of Florida:

Section 1. This act may be known and cited as the Florida territorial waters act.

Section 2. It is the purpose of this act to exercise and exert full sovereignty and control of the territorial waters of the State of Florida.

Section 3. No license shall be issued by the board of conservation under section 370.06, Florida Statutes, to any vessel owned in whole or in part by any alien power, which

subscribes to the doctrine of international communism, or any subject or national thereof, who subscribes to the doctrine of international communism, or any individual who subscribes to the doctrine of international communism, or who shall have signed a treaty of trade, friendship and alliance or a nonagression pact with any communist power. The board shall grant or withhold said licenses where other alien vessels are involved on the basis of reciprocity and retorsion, unless the nation concerned shall be designated as a friendly ally or neutral by a formal suggestion transmitted to the governor of Florida by the secretary of state of the United States. Upon the receipt of such suggestion licenses shall be granted under section 370.06, Florida Statutes, without regard to reciprocity and retorsion, to vessels of such nations.

Section 4. It is unlawful for any unlicensed alien vessel to take by any means whatsoever, attempt to take, or having so taken to possess, any natural resource of the State's territorial waters, as such waters are described by article I of the Constitution of Florida.

Section 5. It is the duty of all harbor masters of the State of Florida to prevent the use of any port facility in a manner which they reasonably suspect may assist in the violation of this act. Harbor masters shall endeavor by all reasonable means, which may include the inspection of nautical logs, to ascertain from masters of newly arrived vessels of all types other than warships of the United States, the presence of alien commercial fishing vessels within the territorial waters of the State of Florida, and

shall transmit such information promptly to the state department of conservation and such law enforcement agencies of the State as the situation may indicate. Harbor masters shall request assistance from the United States Coast Guard in appropriate cases to prevent unauthorized departure from any port facility.

Section 6. All licensed harbor pilots are required to promptly transmit any knowledge coming to their attention regarding possible violations of this act to the harbor master of the port or the appropriate law enforcement officials.

Section 7. All law enforcement agencies of the state, including but not limited to sheriffs and agents of the department of conservation are empowered and directed to arrest the masters and crews of vessels who are reasonably believed to be in violation of this law, and to seize and detain such vessels, their equipment and catch. Such arresting officers shall take the offending crews or property before the court having jurisdiction of such offenses. All such agencies are directed to request assistance from the United States Coast Guard in the enforcement of this act when having knowledge of vessels operating in violation or probable violation of this act within their jurisdictions when such agencies are without means to effectuate arrest and restraint of vessels and their crews.

Section 8. The fine or imprisonment of persons and confiscation proceedings against vessels, gear and catch prescribed for violations of chapter 370, shall be imposed

for violation of this act; provided that nothing herein shall authorize the repurchase of property for a nominal sum by the owner upon proof of lack of complicity in the violation or undertaking.

Section 9. No crew member or master seeking bona fide political asylum shall be fined or imprisoned hereunder.

Section 10. Harbor masters and law enforcement agencies, are authorized to request assistance from the civil air patrol in the surveillance of suspect vessels. Aircraft of the state forestry department or other state or county agencies which are conveniently located and not otherwise occupied may be similarly utilized. Laws 1963, c. 63-202, §§ 1-10.

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